

IN BANKRUPTCY
IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

27/6

B 60/90

IN THE MATTER: of the Insolvency Act 1967

AND:

IN THE MATTER: of ELSA JENSSEN of Napier,
Married Woman

Debtor

EX PARTE MATHEW LOVE of Hastings,
Businessman

Creditor



1093

Hearing &
Judgment: 7 June 1990

Counsel: Mr D R James for petitioning creditor
Judgment Debtor in person

ORAL JUDGMENT OF MASTER J H WILLIAMS QC

This is a petition for the bankruptcy of Elsa Jenssen brought by the petitioning creditor, Mr Love. The petition is based on a nulla bona return, not on the normal bankruptcy notice and further reference will be made to that in due course.

As discernible from Mrs Jenssen's affidavit sworn in this matter, the claim commenced in about June when she, and she says her husband as well, guaranteed the debt of a company which they ran, Gannet Distributors Ltd, then due to the petitioning creditor, Mr Love. She says that she hoped to be able to meet any responsibility under that guarantee from the proceeds of her mother-in-law's estate, the estate of the late Thora Jenssen.

No payment having been made and liability having arisen, Mr Love issued proceedings against Mr and Mrs Jenssen, Gannet

Distributors Ltd and a company called NZ Fisheries Ltd out of the High Court in Wellington under No CP 761/87. That matter came on for trial on 25 September 1989 but it was settled by consent. At that stage, Mr D H Quilliam of counsel was acting for at least the second and third defendants, Mr and Mrs Jenssen, if not for all defendants. The formal judgment shows that judgment was given in Mr Love's favour for \$50,000 inclusive of interest to judgment date, that being with Mr and Mrs Jenssen's consent. It seems that that formal judgment followed a compromise of that proceeding entered into the previous day, 24 September. The text of that compromise has been put before the Court by Mrs Jenssen. It reads as follows:

" The Plaintiff and the 2nd & 3rd Defendants agree:-

1. The 2nd & 3rd Defs agree to judgment being entered for \$50,000 in favour of the Plaintiff, in full and final settlement of this proceeding against the 2nd & 3rd Defs, on terms:-
 - (a) Judgment will not be executed any earlier than one month after the decision of Mr Justice Heron's delivered in the action as to entitlement in the Estate of the late Thora Jenssen. This is to apply regardless of which party to that litigation succeeds and regardless of whether an appeal is lodged by any party.
 - (b) The Plaintiff reserves the absolute right to execute judgment for \$50,000 immediately after expiry of the one month period referred to above. However subject to that, he will exercise goodwill and will take into account, before executing judgment, the realities and practicalities existing at that time, including the anticipated date of distribution in the Estate of the late Thora Jenssen.

Napier 24/9/1989

E. Jenssen

J W Jenssen

M B Wigley
Counsel for the Plaintiff

D H Quilliam
Counsel for the 2nd & 3rd Defendants

M Love"

There was a period of inactivity on Mr Love's part following the compromise of that proceeding. In part that was due to the then pending judgment of Heron J in an application either for recall of probate in the late Thora Jenssen's estate or for probate in solemn form. The date on which the learned Judge actually delivered his judgment does not appear in these papers but Mrs Jenssen made it clear that the result of the judgment was that the administration of her mother-in-law's estate, which she said she had managed for some years, was taken out of her hands. No copy of Mrs Thora Jenssen's will is before the Court but it seems, from what Mrs Jenssen says that she does not now expect to receive any funds from that estate unless Heron J's judgment can be reversed. She said that an appeal has been lodged against the judgment but that no action, or very little action, has been taken to ready that appeal for hearing. Quite clearly, even if the appeal does proceed it will take some considerable time to be finalised.

The additional reason why Mr Love took no immediate action to execute his judgment of 25 September 1989 was because he had agreed to defer execution for a month and because of the phrasing in para (b) of the compromise. However, in March 1990 he issued a writ of sale against Mrs Jenssen and the Sheriff's return of 5 March 1990 makes it clear that Mrs Jenssen had no assets from which to satisfy the consent judgment given some six months previously. The return says that Mrs Jenssen told the Sheriff's Officer that their flats and contents were transferred to their son in 1984 and that the vehicle driven by Mrs Jenssen belonged to one of the Jenssen companies.

Mrs Jenssen opposed this petition in person. Mr Love gave the usual formal evidence and said that his view of the effect of the compromise was that he was not at liberty to issue execution straight away and that it was expected by the Jenssens that they would receive some money from the late Thora Jenssen's estate which would enable them to meet the judgment given in his favour under the guarantee. He gave some evidence

as to his financial position. It seems that it is relatively modest.

Mrs Jenssen also gave evidence. It seems clear that she still hopes to obtain some payment from her mother-in-law's estate and to use that payment, if it is sufficient, to meet the judgment debt due to Mr Love. But there is no detail before the Court as to Mrs Jenssen's estate nor, as noted, are the terms of the will before the Court. Further, as also noted, it is clear that it will be a lengthy period, at best, before any money may be payable to Mrs Jenssen from that source either directly or through her husband. She then said that if she were unsuccessful in obtaining money from her mother-in-law's estate to meet the judgment debt that she hoped that money might be payable to her from her father-in-law's estate, again via her husband. But again there is no detail concerning the worth of that estate nor are the terms of the will in evidence. Mrs Jenssen did say that the father-in-law's estate has now been under administration for about nine years and she said that, contradictorily, on the one hand there was cash in the estate but on the other that the liquidator, by which it is assumed she means the administrator, says that there will be little left in the estate at the end.

In those circumstances, the salient factors are:

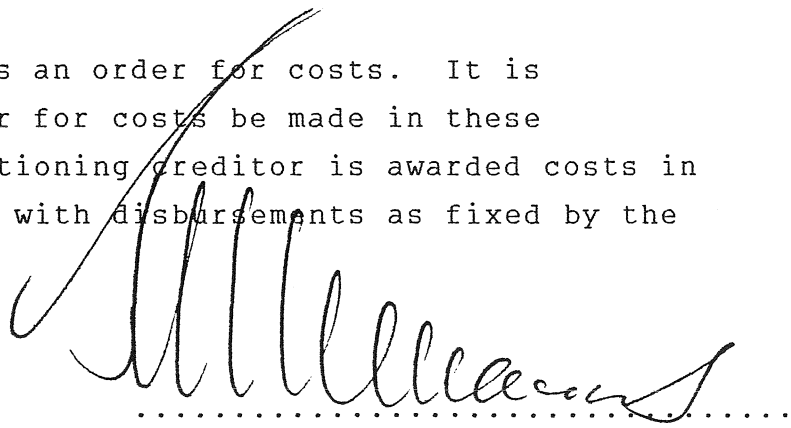
1. That the debt which is the subject of this proceeding is a debt arising on an acknowledged personal guarantee and that that debt has nothing whatever to do with the estates of the Jenssen seniors.
2. That the judgment compromised on 24 September and entered on 25 September 1989 was with the Jenssens' consent
3. That on any view of the matter, Mr Love has fully complied with his obligations under the terms of the compromise not, as he put it, "to rush into execution".

4. That any prospects of payment from the estates of the Jenssen seniors are remote. Even the prospects of payment from Mrs Jenssen's estate must be remote since it is Mrs Jenssen who ought to be bringing the appeal and getting it on for hearing.

In those circumstances, it is clear that an available act of bankruptcy has been made out under the Insolvency Act 1967 s 19(1)(i). It is clear that the prospects of payment are remote and that Mrs Jenssen has no assets of sufficient consequence at the present time in order to meet the judgment.

In those circumstances, there seems no reason to exercise the Court's discretion in Mrs Jenssen's favour. Mr Love is entitled to proceed as he does and there will accordingly be an order for the adjudication in bankruptcy of the judgment debtor.

Counsel for Mr Love seeks an order for costs. It is appropriate that an order for costs be made in these circumstances. The petitioning creditor is awarded costs in the sum of \$850 together with disbursements as fixed by the Registrar.



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Master J H Williams QC

Solicitors: Langley Twigg, Napier for judgment creditor
Elsa Jenssen, PO Box 485 Napier

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